



Signed and Filed: December 9, 2017

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
EDWIN EARL ELLIOTT,) No. 17-30236 DM
Debtor.) Chapter 7
EDWIN EARL ELLIOTT,) Adversary Proceeding
Plaintiff,) No. 17-3047
v.)
PACIFIC WESTERN BANK,)
Defendant.)

MEMORANDUM DECISION ON DEFENDANT'S MOTION TO DISMISS

On October 20, 2017, this court heard oral argument on the motion of defendant Pacific Western Bank (the "Bank") to dismiss a complaint (the "MTD") filed by debtor and plaintiff Edwin Earl Elliott ("Debtor") to avoid and recover a preferential transfer pursuant to 11 U.S.C. § 547.¹ For the reasons set forth below, the court will grant the MTD.

I. Introduction

¹Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Debtor seeks to avoid a release to the Bank by a levying
2 officer of certain funds. Although the levy occurred outside the
3 90-day preference period, the release of the levied funds occurred
4 within 90 days of the bankruptcy petition date. For the reasons
5 stated below, neither the levy nor the subsequent turnover of the
6 levied funds to the Bank constitutes an avoidable transfer.
7 Therefore, the original complaint and the first amended complaint
8 ("FAC") filed by Debtor after the oral argument fail to state a
9 claim upon which relief can be granted.

10 II. Facts

11 On September 6, 2012, the Superior Court of the State of
12 California for the County of San Mateo ("State Court") entered an
13 amended judgment against Debtor and in favor of the Bank in the
14 amount of \$119,470.23, plus attorneys' fees in the amount of
15 \$31,983.56. See the Request for Judicial Notice ("RJN") in
16 support of the MTD filed by the Bank on September 13, 2017 at Dkt.
17 No. 10, pgs. 13-14.

18 Although it has not provided a copy of the relevant request,
19 the Bank states on page 4 of its MTD that it "caused the San Mateo
20 County Sheriff to serve a levy request on IRA Trust Services
21 Company (the 'IRA Custodian')" on December 2, 2016. In the FAC
22 (Dkt. No. 17), Debtor admits in paragraph 13 that "the levy on
23 December 2, 2016, created an execution lien under California law."
24 The State Court docket appended to the RJN reflects that an
25 application and order for a judgment debtor examination was filed
26 on December 5, 2016. See RJN, Exh. 3, Dkt. 10 at pg. 63. The
27 sheriff's office levied \$28,870.19 (the "Levied Cash") from
28 Debtor's account with the IRA Custodian. The levy was incomplete

1 as certain non-liquid assets were not turned over to the Sheriff.
2 The Bank is not claiming any interests "regarding the Incomplete
3 Levy." MTD, Dkt. 9, pg 5 at lines 7-10.

4 On December 8, 2016, Debtor filed a claim of exemption in the
5 State Court. Debtor asserted a need-based exemption pursuant to
6 section 704.115 of the California Code of Civil Procedure ("CCP")
7 in the assets "held and controlled by IRA Trust Services as
8 custodian for my benefit under a qualified retirement account."
9 RJN, Exh. 4, Dkt. 10 at pg. 73. Following a hearing on January
10 11, 2017, the State Court entered an order (on January 20, 2017)
11 denying Debtor's exemption claim. Consequently, on or about
12 February 15, 2017, the sheriff's office released the Levied Cash
13 to the Bank.

14 On March 13, 2017, Debtor filed the underlying chapter 7
15 case. On March 27, 2017, he filed his schedules and statement of
16 financial affairs. On his Schedule C: The Property You Claim as
17 Exempt, the debtor claimed all assets in his IRA as exempt
18 pursuant to CCP § 703.140(b)(10)(E),² including the Levied Cash:

19 SEP IRA: IRA Services Trust Co. (\$28,882.19 cash balance
20 in this SEP IRA, along with Tiara Stock Certificates of
21 unknown quantity, and two partial beneficial interests
in Trustee Loans of \$30,000 each, and an unknown
quantity of PCAP OilStock were seized[.]

22 See Schedule C, Dkt. 8 in 17-30236 at pg 12.

23 On April 17, 2017, Debtor amended his Schedule C to clarify

24 ²CCP § 703.140(b)(10)(E) provides that a debtor in bankruptcy
25 may elect to exempt his or her right to receive "[a] A payment
26 under a stock bonus, pension, profitsharing, annuity, or similar
27 plan or contract on account of illness, disability, death, age, or
length of service, to the extent reasonably necessary for the
support of the debtor and any dependent of the debtor[.]"

1 that the exemption was based on section 522(b)(3)(C) in addition
2 to CCP § 703.140(b)(10)(E). See Dkt. 15 in 17-30236, pg. 3. The
3 Bank did not object to this claim of exemption because it "had
4 *completed* its prepetition levy" and the Levied Cash "did not and
5 does not constitute property of the Debtor or the estate." MTD at
6 pg 5, lines 12-15 (emphasis in original). In addition, the "Bank
7 has confirmed numerous times to the Debtor that it claims no
8 interest regarding the Incomplete Levy" [i.e., on the non-cash,
9 unliquidated assets of the Trust]. *Id.* at lines 7-10.

10 On May 25, 2017, the chapter 7 trustee filed his report of no
11 distribution, and the case was closed on June 21, 2017. On July
12 12, 2017, Debtor filed this adversary proceeding. On September
13 13, 2017, the Bank filed the MTD. On October 4, 2017, Debtor
14 filed a motion to reopen the bankruptcy case. An order reopening
15 the case was signed on the same date. On October 20, 2017, the
16 court held a hearing on the MTD, and in accordance with this
17 court's instructions, the parties submitted supplemental briefing.
18 The court took the matter under submission on November 15, 2017.

19 III. Discussion

20 *A. Debtor Cannot Assert An Avoidance Action Pursuant to*
21 *Section 522(h)*

22 Pursuant to section 522(h), a debtor may seek to avoid a
23 transfer of property to the extent that the debtor could have
24 exempted the property under section 522(g)(1) if the trustee had
25 avoided the transfer, as long as the transfer is avoidable by the
26 trustee under section 544, 545, 547, 548, 549, or 724(a) and the
27 trustee does not attempt to avoid such transfer. A debtor who
28 successfully avoids such a transfer "may recover in the manner

1 prescribed by, and subject to the limitations of, section 550 of
2 this title, the same as if the trustee had avoided such transfer,
3 and may exempt any property so recovered under subsection (b) of
4 this section." 11 U.S.C. § 522(I) (emphasis added). Section 550,
5 in turn, provides that an action or proceeding under that section
6 "may not be commenced after the earlier of -- (1) one year after
7 the avoidance of the transfer on account of which recovery under
8 this section is sought; or (2) the time the case is closed or
9 dismissed."³

10 Here, Debtor cannot avoid as preferential the transfer of the
11 Levied Cash to the Bank because a trustee would not have been able
12 to avoid the transfer of those funds under section 547. The
13 turnover and release to the Bank of the Levied Cash satisfied the
14 Bank's execution lien, which was created and perfected by the levy
15 more than 90 days prior to the petition date. As such, the
16 trustee had no power to avoid that transfer because the Bank did
17 not receive more than it would have received in liquidation, a
18 prerequisite to any preferential transfer liability.⁴ See 11
19 U.S.C. § 547(b)(5). Because Debtor has not identified any grounds
20 for avoiding the transfer of the Levied Cash under the other
21

22
23 ³The Bank argues that the MTD should be granted on the
24 alternate ground that once the case was closed this action was
25 time-barred. Debtor disagrees. Both parties cite opposing non-
binding authority. As it is granting the MTD on other grounds,
the court will not attempt to resolve that dispute.

26 ⁴As discussed in the next section, the Debtor asserts that he
27 can avoid the execution lien pursuant to section 522(f). The
28 court disagrees. But even if he could avoid the execution lien
under section 522(f), the trustee cannot invoke that power.
Section 522(f) does not give a debtor greater powers than a
trustee to avoid transfers under 522(h).

1 sections incorporated by section 522(g) and because the
2 requisites for avoidance under section 547 do not exist here,
3 Debtor has no viable claim under section 522(h).

4 *B. Debtor Cannot Avoid The Turnover of the Levied Cash By*
5 *Avoiding the Lien Pursuant to Section 522(f)*

6 Debtor also asserts that he has standing under section 522(f)
7 "to bring this action in his own right." See paragraphs 10 and 16
8 of the FAC, Dkt. 17. Given that the nonavoidable execution lien
9 was satisfied in part by the transfer of the Levied Cash prior to
10 the petition date, Debtor cannot avoid the transfer under section
11 522(f). Once the Levied Cash was transferred to the Bank, the
12 lien was reduced by the same amount. Thus, the lien on the Levied
13 Cash did not exist as of the petition date.

14 Since the Bank disclaims any claim to recover assets other
15 than the Levied Cash it already has, Debtor's claim in the FAC to
16 avoid the lien on those assets is moot.

17 IV. Conclusion

18 For the foregoing reasons, the court will dismiss the FAC for
19 failure to state a claim on which relief can be granted and for
20 mootness. Counsel for the Bank should prepare and upload an order
21 granting the MTD for the reasons set forth in this memorandum
22 decision. Counsel for the Bank should also prepare a separate
23 judgment in its favor disposing of this adversary proceeding.
24 Counsel should file separately, on the docket, a proof of service
25 certifying compliance with B.L.R. 9021-1(c).

26 *** END OF MEMORANDUM DECISION ***
27
28